A

Ahmad Faizal bin Ahmad Zamzami v Telekom Malaysia Bhd and another appeal

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS B-02(NCVC)(W)-102–01 OF 2023 AND B-02(NCVC)(W)-112–01 OF 2023
NANTHA BALAN, COLLIN SEQUERAH JJCA AND AHMAD KAMAL J
14 AUGUST 2024

C

Contract — Agency — Principal and agent — Claim for unlawful removal of copper cables — Existence of principal agent relationship — Whether principal liable for fraud of agent acting within scope of authority — Whether fraud committed for benefit of principal or agent relevant consideration — Whether agent should act in good faith to fulfil obligations towards principles — Whether principle ought to indemnify losses caused by agents

D

Tort — Vicarious liability — Employer — Claim for unlawful removal of copper cables — Whether employer had knowledge of nefarious scheme conducted by employee — Whether there was close connection between wrongful act and nature of employment of employee — Whether wrongful act carried out in course of employment — Whether employee on a 'frolic of his own' — Whether employer could be held liable for acts of employee

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The two present appeals herein, namely Appeal 102 and Appeal 112 emanated from the judgment of the High Court ('Suit 100'). The appellant in Appeal 102 ('D6'), was the sixth defendant in Suit 100 and the appellant in Appeal 112 was Telekom Malaysia Bhd ('Telekom'), the plaintiff in Suit 100. The respondents in Appeal 112, the first and second defendants in Suit 100 ('D1 and D2'), were Telekom's maintenance and repair contractors. Essentially, the plaintiff's main claim in Suit 100 was for restitution in the sum of RM3,145,821.45 being the loss incurred due to the theft of copper cables. The theft of copper cables was carried out through a nefarious scheme involving D3 (qua employee and as an agent of D1 and D2) and the plaintiff's employees, namely D4, D5 and D6. The plaintiff contended that D1 and D2 were vicariously liable for the wrongful acts of D3 which resulted in the loss of copper cables. The plaintiff also contended that D1 and D2 were liable under contract, to indemnify them for loss and damage caused by the wrongful acts of D3 who acted in collaboration with the plaintiff's said employees. In their defence, D1 and D2 argued that they were not liable for D3's wrongful conduct as D3 acted on a frolic of his own and was not authorised by D1 and/or D2 to do what he did. In the High Court, the judicial commissioner ('JC') decided that the plaintiff should be held 10% liable for contributory

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negligence whereas 90% should be shared between D3, D5 and D6 in the proportion of 80% (D3 and D5) and 20% ('D6'). D4 admitted liability and agreed to pay the full sum of RM3,145,821.45. D1 and D2 were exonerated from any liability in tort/contract. In Appeal 102, D6 appealed against the High Court's decision in allowing the plaintiff's claim wherein D6 was ordered to pay a sum of RM566,247.86. In Appeal 112, the plaintiff appealed against the High Court's decision in dismissing its claim against D1 and D2.

Held, allowing Appeal 112 and dismissing Appeal 102:

(1) This was a case of theft or misappropriation or conversion of the plaintiff's copper cables through the issuance of false/forged maintenance orders based on the appearance of D3's signature in each of the surat kebenaran and the relevant goods issued notes. The relevant surat kebenaran and goods issued notes were all used together with the impugned maintenance orders which carried the official stamp of D1 and D2. The copper cables were then taken out from the plaintiff's store and sold to third parties — ie, not for the benefit of D1 and/or D2. The proper legal test for imposing vicarious liability in tort was that an employer would be liable for the wrongful or even criminal actions of the employee — if the thing done by the employee was so closely connected with the job assigned to that employee. Hence, the test was not, as argued by counsel for D1 and D2 whether the employee was on a 'frolic of his own' (see paras 28–29 & 33).

(2) Based on D3's job scope and his role in this unlawful enterprise undertaken in collaboration with other participants, namely D4 to D6, D3 was engaged in an unlawful activity whilst in the course of his employment with D1 and D2, albeit that his employer had not authorised or instructed him to undertake the impugned activity. Given D3's central or substantive role in this nefarious enterprise and since the actions which he carried out were not alien to his job scope — it was clear that D1 and D2 as his employers must be held liable as D3 was the 'gatekeeper' and together with D4, were the main facilitators of this criminal enterprise which was carried out in collaboration with other actors, eg, D4, D5, and to a lesser extent, D6. Further, there was nothing in the defence of D1 and D2 to suggest that D3's actions were outside the scope of his employment as a maintenance supervisor (see para 40).

(3) Although D1 and D2 did not authorise D3 to do what he did. But in law, D1 and D2 as employers of D3, remain liable for the latter's wrongful acts. There was a lack of appreciation of critical evidence by the JC who concluded, that D1 and D2 were not vicariously liable in circumstances where all that the plaintiff had to establish was whether there was a close

connection between the wrongful act and the nature of D3's employment and that the deed was carried out in the course of D3's employment (see paras 41–43).

(4) D3 apart from being an employee of D1 and D2, was also their agent as D3 was employed to act according to instructions and to work for the benefit of D1 and D2. It was trite that a principal was liable for the fraud of his agent acting within the scope of his authority, whether the fraud was committed for the benefit of the principal or for the benefit of the agent. The High Court had erred in dismissing the plaintiff's claim against D1 and D2 when the common denominators for finding vicarious liability were clearly present. Further, D1 and D2 were liable in contract per cl 43.2 of the contract, to indemnify the plaintiff for the losses suffered as a result of the unlawful removal of copper cables from the plaintiff's store (see paras 45–46).

(5) D6 had actively participated in the nefarious scheme, albeit to a lesser extent or with less culpability as compared to D4 and D5. As such, there was no reason to disturb the High Court's findings against D6. D6's had his suspicions about what was going on and he willingly accepted various sums of money for his role in these impugned transactions. D6's culpability was undeniable although D6's role was a limited one. Hence, the High Court correctly imposed a 20% liability on D6 (equivalent to RM566,247.86). There was no reason or justification to exonerate D6 from his role in this criminal expedition which was orchestrated by the other more culpable players (see paras 51–52).

[Bahasa Malaysia summary

Kedua-dua rayuan di sini, iaitu Rayuan 102 dan Rayuan 112 adalah atas penghakiman Mahkamah Tinggi ('Saman 100'). Perayu dalam Rayuan 102 ('D6'), adalah defendan keenam dalam Saman 100 dan perayu dalam Rayuan 112 ialah Telekom Malaysia Bhd ('Telekom'), plaintif dalam Saman 100. Responden-responden dalam Rayuan 112 adalah defendan pertama dan kedua dalam Saman 100 ('D1 dan D2'), adalah kontraktor penyelenggaraan dan pembaikan Telekom. Pada asasnya, tuntutan utama plaintif dalam Saman 100 adalah untuk ganti rugi sebanyak RM3,145,821.45 yang merupakan kerugian yang ditanggung akibat kecurian kabel tembaga. Kecurian kabel tembaga dilakukan melalui rancangan jahat yang melibatkan D3 (pekerja dan ejen D1 dan D2) dan pekerja plaintif iaitu D4, D5 dan D6. Plaintif berhujah bahawa D1 dan D2 bertanggungjawab secara bersesama atas perbuatan salah D3 yang mengakibatkan kehilangan kabel tembaga tersebut. Plaintif juga berhujah bahawa D1 dan D2 bertanggungjawab di bawah kontrak atas kerugian dan kerosakan yang disebabkan oleh perbuatan salah D3 yang bertindak dengan kerjasama pekerja plaintif tersebut. Dalam pembelaan mereka, D1 dan D2 berhujah bahawa mereka tidak bertanggungjawab atas kelakuan salah D3 kerana D3 bertindak di luar skop kerja dan tidak diberi kuasa oleh D1 dan/atau

D2 untuk melakukan perkara yang dilakukan. Di Mahkamah Tinggi, Pesuruhjaya Kehakiman ('PK') memutuskan bahawa plaintif harus dipertanggungjawabkan 10% atas kecuaian sumbangan manakala 90% harus dikongsi antara D3, D5 dan D6 menurut kadar 80% (D3 dan D5) dan 20% ('D6'). D4 mengaku liabiliti dan bersetuju untuk membayar jumlah penuh sebanyak RM3,145,821.45. D1 dan D2 dibebaskan daripada sebarang liabiliti tort/kontrak. Dalam Rayuan 102, D6 merayu terhadap keputusan Mahkamah Tinggi yang membenarkan tuntutan plaintif di mana D6 diperintahkan membayar sejumlah RM566,247.86. Dalam Rayuan 112, plaintif merayu terhadap keputusan Mahkamah Tinggi dalam menolak tuntutannya terhadap D1 dan D2.

Diputuskan, membenarkan Rayuan 112 dan mengenepikan Rayuan 102:

(1) Ini adalah kes kecurian, penyelewengan atau penukaran kabel tembaga plaintif melalui pengeluaran arahan penyelenggaraan palsu berdasarkan tandatangan D3 dalam setiap surat kebenaran dan nota yang dikeluarkan mengenai barangan berkaitan. Surat kebenaran dan nota yang dikeluarkan mengenai barangan dengan arahan penyelenggeraan mempunyai cop rasmi D1 dan D2. Kabel tembaga kemudiannya dikeluarkan dari kedai plaintif dan dijual kepada pihak ketiga — iaitu, bukan untuk kepentingan D1 dan/atau D2. Ujian undang-undang yang betul untuk liabiliti vikarius dalam tort adalah bahawa majikan akan bertanggungjawab atas tindakan salah malah jenayah yang dilakukan oleh pekerja — sekiranya perkara yang dilakukan oleh pekerja itu begitu berkait rapat dengan pekerjaan yang diberikan kepada pekerja itu. Oleh itu, ujian itu tidak, seperti yang dihujahkan oleh peguam untuk D1 dan D2 sama ada pekerja itu 'bertindak di luar skop kerja' (lihat perenggan 28–29 & 33).

(2) Berdasarkan skop tugas D3 dan peranannya dalam perbuatan haram ini yang dijalankan dengan kerjasama pekerja lain iaitu D4 hingga D6 dan D3 terlibat dengan aktiviti yang menyalahi undang-undang semasa bekerja dengan D1 dan D2, walaupun majikannya tidak memberi kebenaran atau mengarahkannya untuk menjalankan aktiviti yang dipertikaikan. Melihat kepada peranan utama D3 dalam perbuatan haram ini dan tindakan yang dilakukannya tidak asing dengan skop tugasnya — adalah jelas bahawa D1 dan D2 sebagai majikannya haruslah dipertanggungjawabkan kerana D3 adalah 'penjaga pintu' dan bersama-sama dengan D4 yang merupakan perancang utama modus operadi perbuatan jenayah ini yang dijalankan dengan kerjasama pekerja lain iaitu D4, D5 dan D6 yang memainkan peranan yang lebih rendah. Selanjutnya, pembelaan D1 dan D2 tidak mencadangkan bahawa tindakan D3 adalah di luar skop pekerjaannya sebagai penyelia penyelenggaraan (lihat perenggan 40).

(3) Walaupun D1 dan D2 tidak memberi kuasa kepada D3 untuk melakukan apa yang dia lakukan tetapi dari segi undang-undang, D1 dan D2 sebagai majikan D3, kekal bertanggungjawab atas perbuatan salah D3. PK kurang meneliti keterangan yang penting ini dan menyimpulkan bahawa D1 dan D2 tidak bertanggungjawab secara bersesama yang mana perkara yang perlu dibuktikan oleh plaintif adalah sama ada terdapat hubungan rapat antara perbuatan salah dan sifat pekerjaan D3 dan perbuatan itu dijalankan semasa pekerjaan D3 (lihat perenggan 41–43).

(4) Selain menjadi pekerja D1 dan D2, D3 juga merupakan ejen mereka kerana D3 diambil bekerja untuk bertindak mengikut arahan dan bekerja untuk manfaat D1 dan D2. Adalah menjadi undang-undang mantap bahawa prinsipal bertanggungjawab atas penipuan ejennya yang bertindak menurut skop kuasanya, sama ada penipuan itu dilakukan untuk kepentingan prinsipal atau untuk kepentingan ejen. Mahkamah Tinggi telah terkhilaf ketika menolak tuntutan plaintif terhadap D1 dan D2 apabila kriteria umum liabiliti vikarius adalah jelas di dalam kes ini. Selanjutnya, D1 dan D2 bertanggungjawab dalam kontrak menurut klausa 43.2, untuk menanggung rugi plaintif atas kerugian yang dialami akibat kehilangan kabel tembaga dari stor plaintif (lihat perenggan 45–46).

(5) D6 telah mengambil bahagian secara aktif dalam perbuatan jahat tersebut walaupun pada tahap yang lebih rendah atau berbanding D4 dan D5. Oleh itu, tiada sebab untuk mengganggu penemuan Mahkamah Tinggi terhadap liabiliti D6. D6 mempunyai syak wasangka tentang apa yang sedang berlaku namun menerima pelbagai jumlah wang untuk peranannya dalam perbuatan ini. Kesalahan D6 tidak dapat dinafikan walaupun peranan D6 adalah terhad. Oleh itu, Mahkamah Tinggi dengan betul mengenakan liabiliti 20% terhadap D6 (bersamaan dengan RM566,247.86). Tiada sebab atau justifikasi untuk membebaskan D6 daripada peranannya dalam perbuatan jenayah ini yang diatur oleh pekerja lain yang lebih bersalah (lihat perenggan 51–52).]

Cases referred to

Dubai Aluminium Co Ltd v Salaam (Livingstone, third parties) [2002] UKHL 48; [2003] 2 AC 366, HL (refd)

GMP Kaisar Security (M) Sdn Bhd v Mohamad Amirul Amin bin Mohamed Amir [2022] 6 MLJ 369; [2022] 10 CLJ 669, FC (folld)

Lister and others v Hesley Hall Ltd [2002] 1 AC 215, HL (refd)

Lloyd v Grace, Smith & Co [1912] AC 716, HL (refd)

Legislation referred to

Contracts Act 1950 s 135

Industrial Relations Act 1967 s 20

Zulfahami bin Abu Bakar (with Muhammad Firdaus bin Zakaria) (Firdaus Nizam & Co) in Civil Appeal No B-02(NCVC)(W)-102–01 of 2023 for the appellant.
Jeyakumar Palakrishnar (with Nik Asilah bt Aziz) (Zahir Jeya & Zainal) in Civil Appeal No B-02(NCVC)(W)-112–01 of 2023 for the appellant.
Jeyakumar Palakrishnar (with Nik Asilah bt Aziz) (Zahir Jeya & Zainal) in Civil Appeal No B-02(NCVC)(W)-102–01 of 2023 for the respondent.
Khairul Azlee bin Amran (with Faridatul Aqmar bt Ahmad) (Aqmar Ahmad & Co) in Civil Appeal No B-02(NCVC)(W)-112–01 of 2023 for the respondent.

Nantha Balan JCA:

INTRODUCTION

[1] There are two appeals before us, namely Civil Appeal No B-02(NCVC)(W)-102–01 of 2023 ('Appeal 102') and Civil Appeal No B-02(NCVC)(W)-112–01 of 2023 ('Appeal 112'). Both appeals arise from the decision of the learned judicial commissioner of the High Court (Shah Alam) dated 21 December 2022 (rendered after a full trial) in Suit No BA-22-NCvC-100–02 of 2019 ('Suit 100').

[2] The learned judicial commissioner (*who has since retired*) did not furnish full grounds for her decision. However, the judicial commissioner did give broad grounds for her decision. Before us, none of the parties raised any objections as to the absence of the High Court's full grounds. As such, both appeals proceeded on the basis of the broad grounds as found in the record of appeal.

PARTIES

[3] The appellant in Appeal 112 (respondent in Appeal 102) is Telekom Malaysia Bhd ('plaintiff'). The appellant in Appeal 102 is Ahmad Faizal bin Ahmad Zamzami (described below as the sixth defendant — D6). For completeness, it is necessary to identify all the defendants in Suit 100. They are:

(a) Mohd Shukor bin Ahmad
(No K/P: 701021–10–6413)
(Berniaga Sebagai Triple A Communication) (first defendant — 'D1');

(b) Syukur Communication Sdn Bhd
Syarikat: 1149090-K) (second defendant — 'D2');

(c) Kaharuddin bin Yusoff
(No K/P: 770424–08–7287) (third defendant — 'D3');

(d) Fariul Fadzil bin Abdul Rahim
(No K/P: 781212–13–5009) (fourth defendant — 'D4');

(e) Mohd Saleh bin Isthnin
(No K/P: 760308–04–5419) (fifth defendant — 'D5'); and

(f) Ahmad Faizal bin Ahmad Zamzami
(No K/P: 850111–14–5087) (sixth defendant — 'D6').

THE CLAIM

[4] Essentially, the plaintiff's main claim in Suit 100 was for restitution in the sum of RM3,145,821.45 being the loss incurred due to theft of copper cables from their store in Cheras, Kuala Lumpur. D1 and D2 are the plaintiff's maintenance and repair contractors. D3 was an employee of D1 and D2. Specifically, D3 was employed by D1 and D2 as a maintenance supervisor. The theft of copper cables was carried out through a nefarious scheme involving D3 (*qua* employee and as agent of D1 and D2) and the plaintiff's employees, namely D4, D5 and D6. The plaintiff holds D1 and D2 vicariously liable for the wrongful acts of D3 which resulted in the loss of copper cables valued at RM3,145,821.45. According to *Black's Law Dictionary*, 'Vicarious liability' means 'The imposition of liability on one person for the actionable conduct of another, based solely on a relationship between the two persons. Indirect or imputed legal responsibility for acts of another; for example, the liability of an employer for the acts of an employee, or, a principal for torts and contracts of an agent'.

[5] The plaintiff also contends that D1 and D2 are liable under contract, to indemnify them for loss and damage caused by the wrongful acts of D3 who acted in collaboration with the plaintiff's said employees. In their defence, D1 and D2 took the position that they are not liable for D3's wrongful conduct. It was contended that D3 acted on a frolic of his own and was not authorised by D1 and/or D2 to do what he did.

THE CONTRACT

[6] By an agreement known as contract for panel contractors Mini JKH for Regional Network Operation (RNO) dated 21 January 2010 ('the contract') made between the plaintiff and D1's business entity, Triple A Communication, D1 agreed to execute works required by the plaintiff in accordance to the terms therein stated. Subsequently, a novation agreement dated 8 December 2016 was entered between the plaintiff, D1 and D2 whereby D1 agreed to transfer all of its rights, interests, benefits, duties, liabilities and obligations under the contract to D2, while D2 agreed to bound by all terms, conditions and covenants to observed under the said contract.

DISCOVERY OF THEFT

[7] On 9 March 2017, D4 lodged a complaint to the plaintiff's ENZ Maluri Manager, Abdul Majid bin Mohamed Yusop, informing him of his findings that 25 maintenance orders were created without his knowledge and that D4's ID were used. This led to the discovery of the removal of the Foam Skin Puet type cables from the plaintiff's Malaysian Logistic (ML) store at Cheras, Selangor under D4's ID whereby 25 maintenance orders were created through the GEMS system.

[8] Subsequently, two police reports were lodged by Abdul Majid bin Mohamed Yusop and Norazlie bin Nordin on 11 March 2017. This was then escalated to the plaintiff's Group Procurement, Corporate Investigation Unit (CIU) and Fraud Management for further investigation. As part of the investigations, the CIU interviewed D3 to D6. The CIU determined that the 40 maintenance orders (MOs) were created without work instruction and without due authorization via the GEMS system using D4's ID. The total losses of copper cables amounted to RM3,145,821.45.

[9] According to the plaintiff, various telecommunication copper cables were removed from the plaintiff's Malaysian Logistic (ML) store situated in Cheras, Selangor despite there being no breakdown or preventive maintenance then scheduled in 2016 and 2017. The illicit extraction of copper cables took place during the tenure of the contract between the plaintiff and D1, and later under the contract which was novated to D2. The plaintiff's case is that a scheme was carried out with falsified or otherwise forged maintenance orders with purported letters of authorisation to enable the removal of the various cables which led to goods issue notes being issued to D1 and D2. It has not been suggested, or proven that D1 or D2 benefitted in any way from D3's said impugned or unauthorised conduct.

[10] In so far as D6 is concerned, it is said that he participated and was otherwise involved in the scheme in respect of the 40 maintenance orders that are particularly pleaded, and which formed part of a larger scheme involving 55 maintenance orders.

[11] In this regard, the plaintiff had also commenced other proceedings, namely, Shah Alam High Court Suit No BA-22NCvC-70–02 of 2019, Shah Alam Sessions Court Suit No BA-A52NCvC-74–02 of 2019 and Shah Alam Sessions Court Suit No BA-B52NCvC-75–02 of 2019. The present appeals are not concerned with those other legal proceedings.

[12] It is the plaintiff's case that D3, D4, D5 and D6 had used their positions to perpetrate a scheme to defraud the plaintiff, to remove the cables

illegally and otherwise unlawfully, and further procure an advantage for themselves and others in total disregard of their duties and responsibilities. According to the plaintiff, as principal and/or employer, D1 and D2 are liable for any and all the wrongful acts of their employees, agents and/or subcontractors in respect of the fraud perpetrated on the plaintiff. It is accordingly contended that D3's actions fall within the scope of D1's and D2's liability. D1 and D2 had engaged D3 as a maintenance supervisor and are accordingly vicariously liable for the fraud and conversion perpetrated by D3. D4, D5 and D6 as employees of the plaintiff, had acted in breach of their fiduciary, contractual and common law duties to the plaintiff. Consequently, the defendants are liable to the plaintiff for the losses of RM3,145,821.45 suffered in respect of the scheme carried out for the removal of the copper cables. Whilst the trial was on-going, D4 (an employee of the plaintiff) admitted liability and a consent judgment dated 31 May 2022 was recorded wherein D4 agreed to pay the full sum of RM3,145,821.45 with interest and costs.

ISSUES TO BE TRIED

[13] The parties had framed the following issues for determination at the trial:

1. Whether the Foam Skim Puet type cables were unlawfully and/or fraudulently or otherwise wrongfully removed from the plaintiff's Malaysian Logistic (ML) store at Cheras, Selangor.
2. Whether the defendants are liable to the plaintiff for the losses and damages suffered as a result of the removal of the cables aforesaid.
3. Whether the 1st and/or 2nd defendants are liable as a principal and/or master for any and all the wrongs of their employees, agents and/or subcontractor for the removal of the plaintiff's cables.
4. Whether the 1st and/or 2nd defendants are vicariously liable for the fraud and conversion perpetrated by the 3rd defendant.
5. Whether the 4th, 5th and 6th defendants are in breach of their fiduciary, contractual and common law duties to the plaintiff and in the discharge of their respective duties as employees of the plaintiff.
6. Whether the plaintiff is entitled to be indemnified by the 1st and 2nd defendants as the plaintiff's contractors against the wrongful removal of the cables and to the reliefs prayed for.
7. Whether the plaintiff is contributorily negligent for the loss suffered as a result of the 4th, 5th and 6th defendants' actions and conduct.

[14] Separately, D6 framed the following issue pertaining to the plaintiff's case against him:

1. Whether the 6th Defendant has personal knowledge on the contents in the envelope given to him by the 5th Defendant.

THE TRIAL

[15] The trial in the High Court was conducted over 11 days non-consecutive dates (in 2019–2022). A total of 16 witnesses testified for the plaintiff and four witnesses testified for the defendants. The four witnesses for the defence were D1, D3, D5 and D6.

[16] After hearing all the witnesses and perusing the documents relied upon at trial by both the plaintiff and Defendants, the learned judicial commissioner decided that the plaintiff should be held 10% liable for contributory negligence whereas 90% should be shared between D3, D5 and D6 in the proportion of 80% (D3 and D5) and 20% (D6). D1 and D2 were exonerated from any liability in tort/contract. The High Court's order was as follows:

a. *Tuntutan Plaintif terhadap D1 dan D2 ditolak*;

b. Jumlah sebanyak RM2,264,991.44 dibayar oleh D3 dan D5 kepada Plaintif;

c. *Jumlah sebanyak RM566,247.86 dibayar oleh D6 kepada Plaintif*;

d. Gantirugi teladan sebanyak RM50,000.00 sahaja dibayar oleh D5 kepada Plaintif;

e. Kesemua jumlah yang didapati terhutang kepada Plaintif dengan faedah pada kadar 1% setahun dikira daripada 7.3.2017 sehingga tarikh Penghakiman selaras dengan Seksyen 11 Akta Undang-Undang Sivil 1956;

f. Faedah pada kadar 5% setahun daripada Tarikh Penghakiman sehingga penyelesaian penuh;

g. Tiada perintah berkenaan dengan kos terhadap D1 dan D2; dan

h. Kos global sebanyak RM100,000.00 sahaja yang mana D3 dan D5 masing-masing membayar RM40,000.00 kepada Plaintif dan D6 membayar RM20,000.00 kepada Plaintif tertakluk kepada fi alokatur.

[17] In Appeal 102, D6 is appealing against the High Court's decision in allowing the plaintiff's claim wherein D6 was ordered to pay a sum of RM566, 247.86. In Appeal 112, the plaintiff is appealing against the High Court's decision in dismissing its claim against D1 and D2. There is no appeal by D3 and D5. As mentioned earlier, D4 admitted liablity and agreed to pay the full sum — RM3,145,821.45.

[18] Before us, the plaintiff dropped their claim for exemplary and

aggravated damages against D1 and D2. The plaintiff did not appeal against the High Court's ruling that the plaintiff was liable for 10% contributory negligence. Thus, the plaintiff accepted that they are only entitled to 90% of the loss suffered.

HIGH COURT — BROAD GROUNDS

[19] For completeness, and in light of the fact that the High Court did not furnish full written grounds, we have reproduced below, the notes of proceedings which reflects the learned judicial commissioner's broad grounds:

> YA: Baik pertamanya berhubung dengan liabiliti berdasarkan kertas kausa, berdasarkan keterangan afidavit dan keterangan dokumen setelah sepuluh hari ya perbicaraan dijalankan dan keteranganketerangan melalui saksi mahkamah ini membuat keputusan bahawa berhubung liabiliti mahkamah membahagikan proportion the liability 90% kepada defendan dan 10% kepada plaintif sendiri di atas contributory negligence ya I found that di pihak plaintif sendiri terdapat faktor-faktor yang menyebabkan kejadian ini berlaku dimana sistem ya your system I think have to be strengthen because due to this weakness in the system lack of control or supervision, this Court finds that it cause or the reason for your own staffs, your own employees taking advantage of this weak system so I think Mahkamah menyarankan supaya sistem kawalan dan pengawalseliaan Telekom will be look into ya to improve similarly in regards to the investigation I think to avoid being challenge ya in terms of your finding nanti adalah baik juga sistem ataupun S.O.P mengenai siasatan dilihat semula dan diperketatkan.
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> Baik for that matter itu alasan Mahkamah ini memberi keputusan bahawa daripada segi liability is 90% to the Defendant and 10% to the Plaintiff. Baik pertamanya we go to your prayer: '(a) Declaration the the 1st and 2nd Defendants as the Plaintiff's contractor be liable for and indemnify Plaintiff against the removal of the subject cables involving their servant, agent and subcontractor.' Berdasarkan keterangan saksi Mahkamah ini membuat keputusan bahawa pihak Plaintif. Okay secara keseluruhannya pihak Plaintif telah berjaya membuktikan tuntutan mereka terhadap Defendan secara keseluruhannya bahawa terdapat MO yang dipalsukan dan menyebabkan kejadian kabel dikeluarkan tanpa kebenaran. That is proven but with regard to the D1 and D2, Defendan 1 dan Defendan 2, Mahkamah ini mendapati atau membuat keputusan bahawa D1 dan D2 tidak dapat dibuktikan that they are vicariously liable. Mahkamah ini mendapati bahawa kerja-kerja yang telah dilakukan oleh pekerja D1 dan D2 namely Kaharudin ya, D3 adalah satu kerja yang di luar skop. Skop apa ni, perjanjian ataupun perkerjaan antara D1, D2 dan D3 jadi Mahkamah ini berpandangan bahawa pihak Plaintif tidak dapat membuktikan bahawa the nexus between kontrak yang telah diberi kepada D1 dan D2 dengan kejadian atau kecurian kabel-kabel yang dikeluarkan tanpa kebenaran yang sah jadi for that, Mahkamah ini berpandangan bahawa D1 dan D2 tidak menanggung rugi atas losses ataupun perlu mengganti rugi pihak Plaintif terhadap kerugian yang dialami oleh pihak Plaintif. With regards to D3 dan D5 Mahkamah ini mendapati bahawa okay jadi declaration we go back to your prayer: (a) Deklarasi bahawa D1 dan D2 liable and indemnify Plaintiff. Mahkamah berpandangan pihak Defendan 1 dan 2 tidak liable dan tidak perlu menanggung rugi Plaintif. Jadi,

consequently (b) and (c) are not allowed. Now we go to paragraph (d). Paragraph (d) Mahkamah ini mendapati bahawa tuntutan keatas Defendan 3 dan Defendan 5 adalah amat jelas bahawa mereka sememangnya mengambil peranan. Berperanan besar didalam case removal of cables without kebenaran ini. Mahkamah ini juga ingin menyebut bahawa I would call as perhaps the mastermind D4 dimana D4 punya authorization yang telah digunakan dan D4 sendiri yang telah membuat full admission as to his involvement dan D4 sendiri telah mengaku dan telah dimasukkan penghakiman ke atas D4 sejumlah RM3,145,821.45 tuntutan yang telah dibuat oleh Plaintif. So, with regards to D4 I think with his own admission D4 sememangnya telah you know is liable and when it comes to D3 and D5, Mahkamah ini juga telah mendapati bahawa D3 dan D5 is equally liable. D3 dan D5 juga ada peranan masing-masing didalam perkara ini yang menyebabkan kabel-kabel telah dikeluarkan secara tidak sah denagn menggunakan sistem yang perhaps terdapat loopholes ya they had taken the advantage and of course didalam sistem tersebut tidak akan dapat terjadi sekiranya tiada peranan oleh orang dalam.

So in this case, D4 as employee of the Plaintiff himself has actually allowed his authorization his ID to be used for this illegal purposes dan D4 on his own tidak akan dapat you know perkara ini tidak akan berlaku dengan D4 sahaja they have to be sokongan jadi sokongan the team that actually involved in this matter is D4, D3 and D5. With regard D6 now I am at your prayer at paragraph (d) ya D6 telah firstly dia telah membuat permohonan untuk dibatalkan tindakan terhadap D6 and claiming that there is no cause of action but as we have mentioned just now this is allegation of fraud and Order 18 is not fit and proper apa ni, this is not a fit and proper case to be summarily disposed under Order 18 tetapi ini tidak bermakna juga bahawa D6 tidak terlibat.

As much as this Court want to give the benefit to D6 tetapi Mahkamah ini juga mengambil kira admission D6 sendiri yang telah dibuat melalui laporan semasa siasatan yang telah dijalankan oleh pihak dalaman pihak Telekom yang mengatakan bahawa beliau telah mendapat sejumlah wang RM4,000.00 daripada D5 ya jadi disini Mahkamah ini on the balance of probabilities mendapati D6 juga adalah bertanggungan ya also liable. Tapi memandangkan peranan lagi satu keterangan yang membuatkan Mahkamah membuat this finding is due to I think he has the knowledge, D6 ada pengetahuan tetapi beliau juga ada suspicion ke atas kerja-kerja ini yang tidak unlawful but notwithstanding knowing that this something is not right with his apabila beliau diarahkan untuk memberi sampul kepada D3 beliau masih menjalankan ya, masih memberikan sampul tersebut dan juga ataupun apa ni pembelaan yang mengatakan sebenarnya duit yang diterima adalah pembayaran hutang oleh D5 juga Mahkamah dapati tidak ada bukti. So, on that score Mahkamah membuat keputusan bahawa pihak D6 adalah juga bertanggungan. Walaubagaimanapun the sum of RM 3 juta against D3, D5 and D6 Mahkamah ingin membuat secara proportion ya proportionate dimana D3 dan D5 are equally liable but D6 is on the ratio of 80:20 maknanya 80% D3 dan D5 dan 20% Defendan 6. Are you clear on that counsel? You get that?

JP: Very clear.

YA: Alright (e)is Exemplary and Aggravated damages of RM500,000.00 disini Mahkamah ini berdasarkan keputusan yang telah dibuat Mahkamah ini mendapati bahawa hanya D5 sahaja ya. Tuntutan Exemplary and Aggravated damages ini

terhadap D5 sahaja kerana beliau merupakan pekerja Telekom dan Mahkamah menetapkan Exemplary Aggravated damages sebagai contoh untuk menjadi contoh kepada rather untuk menjadi lesson ya kepada pekerjapekerja Telekom dan Mahkamah menetapkan RM50,000.00 sebagai gantirugi dibawah perenggan E yang perlu ditanggung oleh Defendan 5 sahaja.

Berhubung dengan paragraph F, Mahkamah ini ingin menanyakan kepada pihak Plaintif is this the case of interest on interest?

HIGH COURT — SUMMARY OF FINDINGS

[20] At the outset, the learned judicial commissioner opined that by reason of there being a lack of control and/or supervision of the plaintiff's own GEMS System which enabled its own employees to take advantage of such weaknesses, the plaintiff had contributed to the losses it suffered. As such, the High Court was of the view that there was contributory negligence and the plaintiff must bear 10% of the liability of the losses suffered. In so far as D1 and D2 are concerned, the judicial commissioner opined that the claim against them was not proven. The judicial commissioner held that D3's actions were outside the scope of his work and that D1 and D2 were not vicariously liable as the plaintiff had failed to show the nexus between the contract awarded to D1 and D2 and the alleged cable theft. The learned judicial commissioner's conclusion in this regard may be gathered from her broad grounds, the relevant part of which (for convenience) has been reproduced below:

> *Mahkamah ini mendapati bahawa kerja-kerja yang telah dilakukan oleh pekerja D1 dan D2 namely Kaharudin ya, D3 adalah satu kerja yang di luar skop*. Skop apa ni, perjanjian ataupun perkerjaan antara D1, D2 dan D3 jadi Mahkamah ini berpandangan bahawa pihak Plaintif tidak dapat membuktikan bahawa the nexus between kontrak yang telah diberi kepada D1 dan D2 dengan kejadian atau kecurian kabel-kabel yang dikeluarkan tanpa kebenaran yang sah jadi for that, Mahkamah ini berpandangan bahawa D1 dan D2 tidak menanggung rugi atas losses ataupun perlu mengganti rugi pihak Plaintif terhadap kerugian yang dialami oleh pihak Plaintif.

[21] In respect of D3 and D5, the High Court was of the view that both these defendants are equally liable and played a big role in respect of the unauthorized removal of cables. Taking into consideration the admission of liability on the part of D4 whereupon a consent judgment was entered on 31 May 2022, the court further concluded that D3, D4 and D5 have acted and participated in concert to remove the cables illegally and/or unlawfully. In respect of D6, the court took into consideration D6's statement given during the investigation interview conducted on 29 January 2018 whereupon he admitted that he ought not in his capacity, to be receiving instructions from D5 to hand over the envelope containing the maintenance orders to D3. Moreover, notwithstanding his suspicion, D6 nevertheless went along with the scheme which was perpetrated. The High Court was also of the view that D6's

contention in respect of the monies he received from D5 as being repayment of purported loan, was not proven. The following extract from the broad grounds explains the reasons for finding liability against D6:

> As much as this Court want to give the benefit to D6 tetapi Mahkamah ini juga mengambil kira admission D6 sendiri yang telah dibuat melalui laporan semasa siasatan yang telah dijalankan oleh pihak dalaman pihak Telekom yang mengatakan bahawa beliau telah mendapat sejumlah wang RM4,000.00 daripada D5 ya jadi disini Mahkamah ini on the balance of probabilities mendapati D6 juga adalah bertanggungan ya also liable. Tapi memandangkan peranan lagi satu keterangan yang membuatkan Mahkamah membuat this finding is due to I think he has the knowledge, D6 ada pengetahuan tetapi beliau juga ada suspicion ke atas kerja-kerja ini yang tidak unlawful but notwithstanding knowing that this something is not right with his apabila beliau diarahkan untuk memberi sampul kepada D3 beliau masih menjalankan ya, masih memberikan sampul tersebut dan juga ataupun apa ni pembelaan yang mengatakan sebenarnya duit yang diterima adalah pembayaran hutang oleh D5 juga Mahkamah dapati tidak ada bukti.

[22] Based on the above, the High Court apportioned liability in respect of the proven loss of RM3,145,821.45 as follows:

Parties	Percentage of Liability	Amount (RM)
Plaintiff	10%	314,582.15
D3, D5 and D6	90%	2,831,239.30

[23] As the court had determined that D3, D5 and D6 are 90% liable for the losses suffered by the plaintiff, the court further ruled on the proportional distribution of liability in respect of damages as follows:

Parties	Percentage of Damages	Amount (RM)
D3 and D5	80%	2,264,991.44
D6	20%	566,247.86

[24] The High Court declined to grant exemplary damages against D6. However, RM50,000 was awarded against D5 as punitive damages so as to deter others from repeating such wrongdoing. The High Court ordered global costs of RM100,000 of which 40% was apportioned to D3, 40% to D5 and 20% to D6.

[25] In Appeal 102, D6 raised the following grounds in his memorandum of appeal:

> 1. Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang kerana memutuskan bahawa Perayu terlibat di dalam aktiviti urusan penipuan tersebut melibatkan pengeluaran 40 Arahan-Arahan Penyelenggaraan (MOs) yang dicipta tanpa Work Order Instruction dan tanpa kebenaran

melalui system GEMS menggunakan ID Defendan Keempat (No ID: B13677) tersebut sehingga kononnya menyebab kerugian kepada Plaintif sebanyak RM3,145,821.45;

2. Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan bahawa Perayu telah bertindak Bersama-sama Defendan Ketiga, Keempat dan Kelima dengan niat untuk menipu dan menyebabkan kerugian harta Plaintif melibatkan pengeluaran kabel jenis Foam Skin Puet daripada Stor Logistik (ML) Plaintif di Cheras di bawah ID Defendan Keempat.

3. Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang kerana gagal mengambilkira bahawa Defendan Keenam tidak pernah terlibat secara langsung dalam aktiviti penipuan seperti yang didakwa oleh Plaintif tersebut memandangkan pada setiap masa. Defendan Keenam tidak tahu dan tidak mempunyal apa-apa akses kepada apa-apa dokumen yang membawa kepada penipuan tersebut.

4. Yang Arif Hakim telah terkhilaf dari segi fakta kerana gagal mendapati bahawa penglibatan Perayu secara tidak langsung di dalam urusan tersebut adalah di dalam kapasiti untuk menjalankan tanggungjawab dan tugas Perayu sebagai Juruteknik Kanan Responden.

5. Yang Arif Hakim telah terkhilaf dari segi fakta gagal mengambilkira fakta bahawa Defendan Kelima telah berkongsi sejumlah wang sebanyak RM5,000 dengan Perayu sebagai pembayaran hutang Defendan Kelima kepada Perayu.

6. Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang bahawa Responden sebenarnya tidak mempunyai kausa tindakan ke atas Perayu.

[26] In Appeal 112, the plaintiff has raised the following grounds in their memorandum of appeal:

1. The learned judicial commissioner erred in law and/or in fact in deciding that the respondents are not vicariously liable for the wrongful acts of their employee, the 3rd Defendant engaged as their Supervisor, for the fraud perpetrated on the appellant despite deciding that the 3rd Defendant is liable for the fraud.

2. The learned judicial commissioner erred in law and/or in fact in failing to consider that the respondents are further liable to the appellant for the acts of their servants or workmen under the contract for panel contractor Mini JKH for Regional Network Operations (RNO) dated 21.1.2010.

3. The learned judicial commissioner erred in law and/or in fact when failing to appreciate or otherwise properly consider that the fraud committed by the respondents' employee was in the course of his employment and connected to the acts the Supervisor was authorised to do.

4. The learned judicial commissioner erred in law and/or in fact when her Lordship failed to properly consider that the respondents' employee being the supervisor of the respondents and having the authority to remove the cables from the appellant's Malaysian Logistic Store, removed the cables despite having no Work Order Instructions and/or authorisation from the appellant.

5. The learned judicial commissioner erred in law and/or in fact when failing to appreciate or otherwise properly consider that the respondents, by providing the authorisation and/or power to their employee to remove the cables from the appellant's store without any or proper monitoring, the respondents have created risk which exposed the appellant to loss and damage and/or proprietary harm.

6. The learned judicial commissioner erred in law and/or fact when her Ladyship failed to properly consider that the acts of the Supervisor was not independent from the task he was employed to do by the respondents and was otherwise closely connected with his employment.

7. The learned judicial commissioner erred in law and/or fact in deciding that the respondents are not liable to indemnify the appellant for the removal of the cables through the involvement of their employee despite the express requirement under Clause 43.2 of the contract for panel contractor Mini JKH for Regional Network Operations (RNO) dated 21.1.2010.

OUR DECISION

Appeal 112

[27] We will start with Appeal 112 which is the appeal by the plaintiff who is unhappy with the High Court's decision to dismiss the claim against D1, D2 for the wrongful acts committed by their employee, D3. The plaintiff's claim is predicated on fraud and conversion and under the contract which was applicable to D1, and later novated to D2. Under cl 43.2 of the contract, D1, and thereafter D2, are liable to indemnify the plaintiff for any losses or damage due to theft (see: para 11(b) of the statement of claim). Clause 43.2 reads as follows:

> The Contractor shall be liable for and shall indemnify TM against any damages, expense, liability, loss, claim or proceedings due to damage of any kind to any property real or personal (including the Works and any other property of TM) in-so far as such damage arise out of or in the course of or by reason of the execution of the Works, and provided always that the same is due to any negligence, omission, breach of Contract or default of any person for whom the Contractor is responsible including the Contractor's servants or agents or of any sub-contractor, and his servants or agents.

[28] Having reviewed the evidence, it is clear that this was a case of theft or misappropriation or conversion of the plaintiff's copper cables through the issuance of false/forged maintenance orders based on the appearance of D3's signature in each of the *surat kebenaran* and the relevant goods issued notes. The relevant s*urat kebenaran* and goods issued notes were all used together with the impugned maintenance orders which carried the official stamp of D1 and D2. The copper cables were then taken out from the plaintiff's store and sold to third parties — ie not for the benefit of D1 and/or D2. The maintenance orders were issued using the plaintiff's GEM system by the use of D4's password ID. During the trial, D4 admitted liability and a consent order for the full sum of RM3,145,821.45 was recorded.

[29] The learned judicial commissioner dismissed the plaintiff's claim against D1 and D2 — on the basis that there was 'no nexus'. However, in our view, the learned judicial commissioner's use of the phrase 'no nexus' (para [17] of this judgment) is rather perplexing, particularly since the proper legal test for imposing vicarious liability in tort is as enunciated by the Federal Court in *GMP Kaisar Security (M) Sdn Bhd v Mohamad Amirul Amin bin Mohamed Amir* [2022] 6 MLJ 369; [2022] 10 CLJ 669 (FC) ('GMP Kaisar') per the judgment of Harminder Singh, FCJ who distilled the well-established principles from English cases and said that an employer will be liable for the wrongful or even criminal actions of the employee — if the thing done by the employee is *so closely connected with the job assigned* to that employee.

[30] The issue in *GMP Kaisar* was whether the security firm (GMP Kaisar) was vicariously liable for the criminal acts of their employee (Jaafar) who was employed as a bodyguard for GMP Kaisar's client and whilst in that capacity, had discharged the firearm and caused death to several persons and inflicted injuries to, inter alia, the plaintiff. The Federal Court opined that GMP Kaisar was liable for Jaafar's acts. The Federal Court said in paras [31] and [32]:

> [31] In our considered opinion, and after considering the prevailing law we have set out in the foregoing discussion, the scope of vicarious liability in a case where the employee committed an intentional wrong is underpinned by the following common denominators:
>
> (a) the intentional wrong must be committed by the employee in the course of employment;
>
> (b) there must be connection between the wrongful act and the nature of the employment;
>
> (c) the nature of the employment is such that the public at large are exposed to risk of physical or proprietary harm; and
>
> (d) the risk is created by the employer, owing to the features of the business.

[32] Applying these factors to the instant case, we do not see how the High Court and the majority in the Court of Appeal had erred in applying the close connection test. In our view, there cannot be any blemish on the decisions of the courts below for the following reasons.

[31] The following paragraphs from the FC's judgment in *GMP Kaisar* are instructive and wholly applicable to the present case.

[35] By providing Jaafar with a firearm to perform his duty as personal bodyguard, GMP has created a risk which exposed the public to potential harm. The risk manifested into reality when Jaafar decided to embark on a rampage for reasons only known to him. As reiterated earlier, GMP had created an opportunity for Jaafar to utilise the Glock automatic, albeit for wrongful intent.

There is therefore little doubt that the wrongful act committed by Jaafar is closely connected with the line of work assigned to him by GMP, and for which GMP equipped him with the lethal weapon. As stated earlier, Jaafar was on duty that fateful day pursuant to his employment as a personal bodyguard.

[36] Now, Jaafar's actions may have been unauthorised by his employer but the pertinent question to ask is whether Jaafar's actions in unlawfully discharging his firearm and causing injury to Amirul was so closely connected with his employment that it would be fair and just to hold the employer vicariously liable. On the facts of this case and for the reasons we have already stated, the answer must be yes. To put it in another way, Jaafar's wrongful act was not independent from the task he was employed to do. In this connection, it is apposite to recall the words of Lord Millet in the House of Lords case of *Lister and others v Hesley Hall Ltd*:

> *So, it is no answer to say that the employee was guilty of intentional wrongdoing, or that his act was not merely tortious but criminal, or that he was acting exclusively for his own benefit, or that he was acting contrary to express instructions, or that his conduct was the very negation of his employer's duty.*
>
> ...
>
> *The law is mature enough to hold an employer vicariously liable for deliberate, criminal wrongdoing on the part of an employee without indulging in sophistry of this kind.*

[37] There was also a common thread in the plethora of cases cited to us (see for example *Roshairee bin Abdul Wahab v Mejar Mustafa bin Omar & Ors* [1996] 3 MLJ 337; *Bohjaraj a/l Kasinathan v Nagarajan a/l Verappan & Anor* [2001] 6 MLJ 497; [2001] 3 AMR 3260; *Bernard v The Attorney General of Jamaica* [2005] 2 LRC 561 and *Lister and others v Hesley Hall Ltd*) in that, the nature of the work carried out by the employees exposed third parties (the innocent members of the community) to the risk or danger to their lives or safety, and, *the same nature of the work allowed the malevolent employees the opportunity to commit the intentional wrong on the third parties*.

[32] For completeness, we think that it is also relevant to refer to paras [21] and [22] of the Privy Council's decision in *Dubai Aluminium Co Ltd v Salaam*

(Livingstone, third parties) [2002] UKHL 48; [2003] 2 AC 366, referred to by the Federal Court in *GMP Kaisar*'s case where Lord Nicholls had explained the underlying policy for the imposition of vicarious liability on an employer for the criminal acts of their employee:

> 21. However, this latter fact does not of itself mean that the firm is exempt from liability for his wrongful conduct. Whether an act or omission was done in the ordinary course of a firm's business cannot be decided simply by considering whether the partner was authorised by his co-partners to do the very act he did. *The reason for this lies in the legal policy underlying vicarious liability. The underlying legal policy is based on the recognition that carrying on a business enterprise necessarily involves risks to others. It involves the risk that others will be harmed by wrongful acts committed by the agents through whom the business is carried on. When those risks ripen into loss, it is just that the business should be responsible for compensating the person who has been wronged.*
>
> 22. *This policy reason dictates that liability for agents should not be strictly confined to acts done with the employer's authority*. Negligence can be expected to occur from time to time. Everyone makes mistakes at times. Additionally, it is a fact of life, and therefore to be expected by those who carry on businesses, that *sometimes their agents may exceed the bounds of their authority or even defy express instructions. It is fair to allocate risk of losses thus arising to the businesses rather than leave those wronged with the sole remedy, of doubtful value, against the individual employee who committed the wrong. To this end, the law has given the concept of 'ordinary course of employment' an extended scope.*

[33] Hence, the test is not, as argued by counsel for D1 and D2 whether the employee was on a 'frolic of his own'. Here, D3 was D1, D2's employee and was a maintenance supervisor and it was within his job scope to sign the Surat Kebenaran and the Goods Issued Notes, except that in this case, he signed and used the official stamp of D1, D2 to facilitate the illicit extraction of copper cables from the plaintiff's store based on the impugned MO's which were all falsified/forged. Hence, following *GMP Kaisar's* case, the learned judicial commissioner should have asked (*but did not ask*) whether the common denominators for imposing vicarious liability were established, namely:

(a) the intentional wrong must be committed by the employee in the course of employment;

(b) there must be connection between the wrongful act and the nature of the employment;

(c) the nature of the employment is such that the public at large are exposed to risk of physical or proprietary harm; and

(d) the risk is created by the employer, owing to the features of the business.

D1 AND D2 — DEFENCE

[34] We turn now to D1 and D2's pleaded case per their defence. The essence of the defence of D1 and D2 can be gleaned from paras 9.1 to 9.8 of their defence where they totally disavowed any knowledge of, or authorization to D3 to commit the misdeeds, criminal or fraudulent acts. The defence reads relevantly as follows:

> 9.1 That the 1st and 2nd Defendant denies any knowledge on the existence of 40 sets of documents comprising Maintenance Orders, Authorisation Letters and Goods Issue Noted to pull out cables from the Plaintif ML store at Cheras which were falsely issued in the name of Triple A Communication dan Syukur Communication Sdn Bhd;
>
> 9.2 That any communication pertaining to the issuance and production of 40 sets of documents comprising Maintenance Orders, Authorisation Letters and Goods Issue Noted were solely between the 3rd Defendant, 5th and 6th Defendant;
>
> 9.3 That the unlawful utilization of any of the 1st and 2nd Defendant business and trading chop or stamp by the 3rd, 4th, 5th and 6th Defendant were used without any authorization and/or consent by the 1st and 2nd Defendant;
>
> 9.4 That the 3rd Defendant has acted solely on his own and under the order of the 5th and 6th Defendant in executing all of the forged 40 Maintenance Orders which were claimed issued in the name of the and 2nd Defendant;
>
> 9.5 That the 1st and 2nd Defendant denies any instruction given to the 3rd Defendant on the execution of 40 sets of documents comprising Maintenance Orders, Authorisation Letters and Goods Issue Noted to pull out cables from the Plaintif ML store at Cheras which were falsely issued in the name of Triple A Communication dan Syukur Communication Sdn Bhd;
>
> 9.6 That the 1st and 2nd Defendant denies any cable pulling instruction given to the 3rd Defendant from any of the plaintiff's warehouse Including from the Plaintif ML store at Cheras;
>
> 9.7 The 1st and 2nd Defendant pleads that they have no knowledge and/or control and/or supervision and access in connection with the method of execution, delivery and completion of pulling and transporting cables by the 3rd Defendant from the Plaintiff's Malaysian Logistic (ML) store at Cheras, Selangor;
>
> 9.8 That all of the relevant control and/or execution and/or delivery and/or completion of any pulling and transporting cables works from the Plaintiff's Malaysian Logistic (ML) store at Cheras, Selangor have all been done and perpetrated by the 3rd Defendant upon receiving the direct instruction from the 6th Defendant;

[35] In so far as the issue of the claim based on vicarious liablity against D1 and D2, it is pertinent to note that in their defence, D1 and D2 had stated that they had no knowledge of the nefarious scheme which was facilitated by the case of fake maintenance orders and Surat Kebenaran which carried the

corporate stamp of D1 and D2 respectively. Essentially D1 and D2 distanced themselves from D3's conduct and stated that he (D3) acted entirely on his own and had collaborated with the plaintiff's employees. The defence goes on to state the following:

> 12.1 That the 3rd Defendant has obtained a direct instruction and orders from the 5th and 6th Defendant to unlawfully remove the cables under the forged 40 maintenance orders;
>
> 12.2 That the 1st and 2nd Defendant denies any Instruction given to the 3rd Defendant on the execution of 40 sets of documents comprising Maintenance Orders, Authorisation Letters and Goods Issue Noted to pull out cables from the Plaintif ML store at Cheras which were falsely issued in the name of Triple A Communication dan Syukur Communication Sdn Bhd;
>
> 12.3 That the 1st and 2nd Defendant denies any knowledge and/or any acceptance of all 40 sets of documents comprising Maintenance Orders, Authorisation Letters and Goods Issue Noted to pull out cables from the Plaintif ML store at Cheras which were falsely issued in the name of Triple A Communication dan Syukur Communication Sdn Bhd;
>
> 12.4 That all 40 sets of documents comprising Maintenance Orders, Authorisation Letters and Goods Issue Noted to pull out cables from the Plaintif ML store at Cheras which were falsely issued in the name of Triple A Communication dan Syukur Communication Sdn Bhd were forged and have under no circumstances acknowledged and/or received by the 1st and 2nd Defendant;
>
> 12.5 There were no Maintenance Orders emailed to the 1st and 2nd Defendant neither communicated in writing by the Plaintiff of the said works although the method of ordering have been stipulated under clause 5 of the said Contract;
>
> ...
>
> 14.1 That the 1st and 2nd Defendant denies any knowledge and/or any acceptance of all 40 sets of documents comprising Maintenance Orders, Authorisation Letters and Goods Issue Noted to pull out cables from the Plaintif ML store at Cheras which were falsely issued in the name of Triple A Communication dan Syukur Communication Sdn Bhd;
>
> 14.2 That the 3rd, 4th, 5th and 6th Defendant had forged the 1st and 2nd Defendant business and trading chop and it has been used without any authorization and/or consent by the 1st and 2nd Defendant;
>
> 14.3 That the 3rd Defendant has acted unlawfully by obeying the 5th and 6th Defendant instruction to execute all of the forged 40 maintenance order which were claimed to be issued in the name of the 1st and 2nd Defendant;
>
> 14.4 That the 1st and 2nd Defendant denies any instruction given to the 3rd Defendant on the execution of 40 sets of documents comprising Maintenance Orders, Authorisation Letters and Goods Issue Noted to pull out cables from the Plaintif ML store at Cheras which were falsely Issued in the name of Triple A Communication dan Syukur Communication Sdn Bhd;

14.5 That the 1st and 2nd Defendant denies any instruction given to the 3rd Defendant to pull out cables from the Plaintif ML store at Cheras which were falsely issued in the name of Triple A Communication dan Syukur Communication Sdn Bhd;

14.6 The 1st and 2nd Defendant pleads that they have no knowledge and/or control and/or supervision and/or access in connection with the method of execution, delivery and completion of pulling and transporting cables by the 3rd Defendant from the Plaintiff's Malaysian Logistic (ML) store at Cheras, Selangor;

14.7 That all of the relevant control and/or execution and/or delivery and/or completion of any pulling and transporting cables works from the Plaintiff's Malaysian Logistic (ML) store at Cheras, Selangor have all been done and perpetrated by the 3rd Defendant upon receiving the direct instruction from the 6th Defendant;

[36] At para [20] of the defence, D1 and D2 sought to shift the blame to the plaintiff in failing to supervise their own employees (D4, D5 and D6). This is how D1 and D2 had pleaded contributory negligence against the plaintiff:

20. The 1st and 2nd Defendant pleads that the Plaintiff had negligently contributed to the losses that the Plaintiff has allegedly suffered and the Plaintiff is hereby stopped by negligence from claiming the losses against the 1st and 2nd Defendant on the following details:-

20.1 That the Plaintiff has failed and/or negligence to reasonably supervise the conduct of the 4th, 5th and 6th Defendant being the Plaintiff's representative, from unlawfully abusing the Plaintiff's documentation process of all of the forty Maintenance Orders, Letter of Authorization and Goods Issuance and further, collaborating with the 3rd Defendant as the transport agent appointed by the 6th Defendant, to pull out the Plaintiff's cable so as had caused the losses and damages to the Plaintiff;

20.2 That the Plaintiff has the duty of care to the 1st and 2nd Defendant in reasonably supervising the conduct of the 4th, 5th and 6th Defendant being the Plaintiff's representative, from unlawfully abusing the Plaintiff's documentation process of all of the forty (40) Maintenance Orders, Letter of Authorization and Goods Issuance and further, collaborating with the 3rd Defendant as the transport agent appointed by the 6th Defendant, to pull out the Plaintiff's cable so as to caused the losses and damages to the 1st and 2nd Defendant when the Contract was suspended by the Plaintiff;

20.3 That the Plaintiff has failed and/or negligence to reasonably supervise the conduct of the 4th, 5th and 6th Defendant being the Plaintiff's representative, whom had unlawfully manipulating the GEMS system which were at material time, within the Plaintiff's responsibility during the execution of the said Contract and which had causing the losses and damages to the Plaintiff;

20.4 That the Plaintiff has the duty of care to the 1st and 2nd Defendant in reasonably supervising the conduct of the 4th, 5th and 6th Defendant being the Plaintiff's representative, from fraudulently abusing the security of GEMS

system of which at that point of time under the Plaintiff' control so as has caused the losses and damages to the 1st and 2nd Defendant when the Contract was suspended by the Plaintiff;

21. In view of the above circumstances, the Plaintiff has negligently contributed to the losses and damages as claimed under this suit.

D3 — JOB SCOPE

[37] We turn now to D3's job description/scope *qua* employee of D1 and D2. In his witness statement, D3 stated the following;

2. Soalan: Apakah hubungan encik dan Plaintif?

Jawapan: Saya merupakan seorang penyelia yang bekerja di bawah Defendan Pertama dan Ke-2. Kedua-dua Defendan tersebut bekerja dengan Plainitf.

Soalan: Apakah peranan encik ketika itu?

Jawapan: Peranan saya pada ketika itu adalah seperti berikut:

a. Menghadiri mesyuarat bersama TM sebagai wakil syarikat Triple A.

b. Survey site dengan penyelia TM ditapak projek.

c. Menyediakan pelan kerja, sebutharga dan list barang-barang yang diperlukan dan email kepada Penyelia (SO) TM.

d. Menerima MO dan permit kerja dari Penyelia (SO) TM.

e. Menyelia pengambilan barang-barang kerja(kabel, dp box, drop wire, UY2 connector, clousere dan lain-lain) di stor TM

f. Menyelia kerja-kerja di tapak projek(tarik kabel, joint kabel, tranfer kabel, kemas dan recover kabel).

g. Menyelia kerja-kerja Return scrap kabel dan lain-lain barang kepada pihak stor TM apabila projek selesai dijalankan.

h. Menyelia pengujian ditapak projek dengan Penyelia (SO) TM apabila kerja-kerja selesai dijalankan.

[38] As for the *modus* of the impugned transactions, D3 stated the following in his witness statement:

Jawapan: Saya tidak tahu apa yang berlaku setelah kabel-kabel tersebut dikeluarkan. Namun saya menerima di wang berjumlah RM1300.00 sehingga RM2500.00 untuk setiap kabel selepas beberapa hari dikeluarkan.

Soalan: Adakah encik tahu apakah tujuan dikeluarkan?

Jawapan: Tidak. kabel-kabel itu Soalan : Jawapan: Sebanyak berapa kali hal ini berlaku? Saya tidak pasti.

Soalan: Sila encik rujuk Ikatan dokumen bersama bahagian C mukasurat

124–126,133–135, 142–144, 155–157, 163–165, 172–174, 181–183, 193–195, 201–203, 210–212, 219–221, 230–232, 239–241, 247–249, 256–258, 264–266, 272–274, 280–282, 289–291, 297–299, 306–308, 314–316, 322–324, 331–333, 342–344. Apakah dokumen-dokumen ini?

Jawapan: Ini adalah Maintenance Order.

Soalan: Bagaimana pula dengan dokumen di Ikatan Dokumen Tambahan Bahagian C muka surat 157–158, 166–168, 174–176, 186–188, 195–197, 203–205, 212–214, 223–225, 236–238, 245–247, 258–260, 271–273, 283–285, 291–293, 299–301?

Jawapan: Sama. Semua adalah maintenance order.

Soalan: Berdasarkan MO tersebut, siapakah yang mengeluarkannya?

Jawapan: Norazlie Nordin.

Soalan: Siapakah yang menyerahkan MO ini kepada encik?

Jawapan: Defendan ke-5 atau Defendan ke-6.

Soalan: Adakah setiap pengeluaran kabel memerlukan MO?

Jawapan: Ya.

Soalan: Sila encik rujuk Ikatan dokumen bersama bahagian C mukasurat 127, 136, 145, 158, 166, 175, 184, 196, 204, 213, 222, 233, 242, 250, 259, 267, 275, 283, 292, 300, 309, 317, 325, 334, 345. Apakah dokumen-dokumen tersebut?

Jawapan: Dokumen-dokumen tersebut adalah surat kebenaran.

Soalan: Bagaimana pula dengan dokumen di Ikatan Dokumen Tambahan Bahagian C muka surat 159, 169, 177, 189, 198, 206, 215, 226, 239, 248, 261, 274, 286, 294, 302?

Jawapan: Sama. Semua adalah surat kebenaran.

Soalan: Boleh encik ceritakan kepada Mahkamah apakah dimaksudkan dengan surat kebenaran tersebut?

Jawapan: Surat kebenaran tersebut dikeluarkan bersama MO. Jika terdapat permintaan untuk mengeluarkan kabel dari pihak kontraktor, MO dan surat kebenaran akan dikeluarkan.

Soalan: Kepada siapa surat kebenaran ini dikeluarkan?

Jawapan: Kepada stor ML Cheras dan saya hantar surat tersebut ke ML Cheras atas kapasiti sebagai wakil daripada Triple A Communication.

Soalan: Berdasarkan surat kebenaran tersebut, siapa yang mengeluarkannya?

Jawapan: Norazlie Nordin.

Soalan: Siapakah yang menyerahkan surat-surat ini kepada encik? Jawapan: Saya menerima surat kebenaran bersama MO daripada Defendan ke-5 atau Defendan ke-6.

Soalan: Apakah kepentingan surat kebenaran tersebut?

Jawapan: Kabel-kabel tidak dapat dikeluarkan jika tiada surat kebenaran dikeluarkan.

Soalan: Sila encik rujuk kepada Ikatan dokumen bersama bahagian C mukasurat 128, 137, 146, 159, 167, 176, 185, 197, 205, 214, 223, 234, 243, 251, 260, 268, 276, 284, 293, 301, 310, 318, 326, 335, 346 apakah dokumen-dokumen tersebut?

Jawapan: Good Issue Note.

Soalan: Bagaimana pula dengan dokumen di Ikatan Dokumen Tambahan Bahagian C muka surat 160, 170, 178, 190, 199, 207, 216, 227, 240, 249, 262, 275, 287, 295, 3037

Jawapan: Sama. Semua adalah Good Issue Note.

Soalan: Sila rujuk Ikatan dokumen bersama bahagian C mukasurat 121–122. Apakah dokumen tersebut?

Jawapan: Ini adalah keterangan saksi saya sewaktu saya disoal siasat oleh pihak Plaintif pada 29/1/2018.

Soalan: Adakah keterangan ini benar?

Jawapan: Benar.

Soalan: Ada apa-apa lagi yang encik ingin beritahu pada Mahkamah mengenai kenyataan tersebut?

Jawapan: Tiada.

[39] Next, we think that it is also necessary to refer to D3's statement given to the plaintiff's fraud investigation team where he furnished details as to his role in the illicit extraction of copper cables from the plaintiff's store. This is what he told the plaintiff's investigators:

Soalan 1: Sila terangkan berkenaan diri dan kerjaya anda?

Jawapan 1: Isteri saya bernama Hamidah binti Nordin. Beliau bertugas di KK Supermart sebagai Pengurus babagian Putrajaya/Banting. Saya mempunyai 2 orang anak. Anak pertama saya tinggal dengan bekas isteri saya. Anak kedua saya tinggal bersama saya di Beruas. Saya mula bekerja dengan Target Cash Holding pada tahun 2000 dan bertugas sehingga tahun 2006. Syarikat ini membuat kerja-kerja pembaikan kabel Telekom Malaysia. Pada tahun 2006 saya berpindah ke syarikat HPK Industries Sdn. Bhd. dan bertugas selama setahun, Pada tahun 2007 saya pulang ke kampung kerana mengalami masalah kesihatan selama 3 tahun. Pada tahun 2010 saya mula bertugas bersama Triple A Communication Sdn Bhd. Pada tahun 2016, syarikat Triple A telah tukar nama kepada Shukor Communication Sdn. Bhd. Pada bulan Mac 2017, saya telah meninggalkan syarikat Shukor Comm tanpa memberi notis letak jawatan.

Soalan 2: Saksi telah dirujuk kepada 42 set dokumen yang mengandungi Maintenance Order (MO), Surat Kebenaran dan Goods Issue Note.

Sila jelaskan berkenaan dokumen ini?

Jawapan 2: Saya pernah lihat dokumen ini. Dokumen ini adalah untuk pengambilan barang di ML Cheras jika berlaku breakdown. Saya menerima dokumen ini bermula awal tahun 2016 sehingga awal tahun 2017. Semua arahan datang daripada Saleh. Kebanyakan dokumen saya terima diberi olch Salch. Jika Saleh sibuk, beliau akan minta Ahmad Faizal hantarkan dokumen ini kepada saya. Saya tidak tahu siapa yang buat MO tersebut. Saleh cuma beritahu saya minta tolong untuk keluarkan kabel dari ML Cheras. Saya tidak tahu siapa yang sediakan surat kebenaran. Saya yakin dokumen ini adalah tulen kerana terdapat cop dan sign Norazlie dan Majid walaupun MO dan Surat Kebenaran atas nama Triple A Communication Sdn. Bhd. tetapi kerja-kerja tidak dilakukan oleh syarikat saya ketika itu. *Saya mengaku saya menyalahgunakan kuasa saya sebagai pihak yang dibenarkan mengeluarkan barang di ML Cheras dan pihak syarikat Triple A Communication tidak mengetahui penyelewengan yang saya lakukan.*

Soalan 3: Sila jelaskan dengan lebih lanjut peranan dan penglibatan anda?

Jawapan 3: Saya menerima MO dan Surat Kebenaran sama ada saya mengambilnya di TM Maluri, hadapan 7-Eleven Maluri, di pejabat Triple A Communication, dan di Tesco Extra Cheras daripada Salch. Saya akan menunggang motorsikal saya untuk ke ML Cheras. Apabila saya dapat Good Issue Note dari ML Cheras, saya akan menghubungi Puven untuk dapatkan nama pemandu lori dan nombor plat lori yang akan mengambil kabel. Saya akan berjumpa dengan Zainuddin dan Noor Azeanty untuk membuat pengeluaran kabel kerana hanya mereka yang boleh mengeluarkan kabel copper. Saya selalu berjumpa dengan Suresh dan George untuk mengeluarkan kabel dari ML Cheras. Suresh dan George adalah pemandu lori bagi syarikat Puven. Selepas kabel dikeluarkan dari ML Cheras, saya tidak tahu halatuju kabel berkenaan.

Saya menerima di antara RM1300.00 sehingga RM2500.00 untuk setiap kabel yang Berjaya dikeluarkan. Saleh akan bank in kepada saya di antara sehari ke dua hari selepas kabel dikeluarkan. Saya tidak tahu sama ada kabel berkenaan dijual atau dipasang di mana-mana.

Soalan 4: Sila jelaskan peranan dan penglibatan Fariul Fadzil bin Abdul Rahim, Mohd Saleh bin Isthnin dan Ahmad Faizal bin Ahmad Zamzami dalam insiden ini?

Jawapan 4: Saya kenal Fariul Fadzil bin Abdul Rahim tetapi Fairul tidak terlibat dalam insiden ini. Saya kenal Mohd Saleh bin Isthnin dan Saleh terlibat dalam insiden ini kerana saya hanya berhubung dengan Saleh dalarn insiden ini. Saya kenal Ahmad Faizal bin Ahmad Zamzami kerana Ahmad Faizal akan menghantar MO dan Surat Kebenaran kepada saya jika Saleh sibuk.

Soalan 5: Sila jelaskan peranan dan penglibatan Puvanenthira?

Jawapan 5: Saya kenal Puven melalui Saleh. Saleh beri nombor telefon Puven kepada saya untuk menguruskan pengeluaran kabel dari ML Cheras. Puven akan beri nama pemandu dan nombor plat lori untuk saya mengisi borang pengeluaran kabel di ML Cheras.

Soalan 6: Sila jelaskan apa yang berlaku pada bulan Mac 2017.

> Jawapan 6: Saya tahu yang TM telah kesan kegiatan saya apabila diberitahu oleh Saleh. Saleh beritahu pihak TM akan menyoal saya dan membuat siasatan terhadap syarikat saya. Saleh menyuruh saya melarikan diri semasa saya berada di pejabat Shukor Communication Sdn Bhd. Selepas itu, Puven telah menghubungi saya menyuruh saya lari dan memberi saya RM5000.00. Puven berjanji akan memberi saya RM3000.00 setiap bulan untuk saya menyara hidup saya dan keluarga saya setelah saya kehilangan kerja bermula bulan Mac 2017 sehingga Januari 2018. Saya menerima 2 kali sebanyak RM3000.00 manakala setiap bulan lain saya cuma menerima antara RM1500.00 sehingga RM2300.00.

[40] Having examined the evidence, particularly D3's evidence as to his job scope and his role in this unlawful enterprise undertaken in collaboration with other paricipants, namely D4 to D6, it is our finding that D3 was engaged in unlawful activity whilst in the course of his employment with D1 and D2, albeit that his employer had not authorised or instructed him to undertake the impugned activity. Indeed, it would seem that they had no knowledge of D3's covert activities. At any rate, in these circumstances, we think that given D3's central or substantive role in this nefarious enterprise and since the actions which he carried out are not alien to his job scope — it is clear that D1 and D2 as his employers must be held liable both in tort and in contract (per cl 43.2 of the contract) as D3 was the 'gatekeeper' and together with D4, were the main facilitators of this criminal enterprise which was carried out in collaboration with other actors eg D4, D5, and to a lesser extent, D6. In fact, there is nothing in the defence of D1 and D2 to suggest that D3's action were outside the scope of his employment as a maintenance supervisor.

[41] Indeed, counsel for D1 and D2 when pressed on this point conceded that D3's actions were within his job scope, except that he was not instructed or authorised to carry out the scheme. Of course, we accept that D1 and D2 did not authorise D3 to do what he did. But in law, D1 and D2 as employers of D3, remain liable for the latter's wrongful acts, so long as the common denominators, referred to *GMP Kaisar*'s case are present.

[42] Clearly, D3 was not doing anything which was alien to his job scope. What he did was to use the opportunity to commit fraud and illicitly extract copper cables from the plaintiff's store. Hence, it was a misdirection for the High Court to conclude that:

> ... kerja-kerja yang telah dilakukan oleh pekerja D1 dan D2 namely Kaharudin ya, D3 adalah satu kerja yang di luar skop. Skop apa ni, perjanjian ataupun perkerjaan antara D1, D2 dan D3 jadi Mahkamah ini berpandangan bahawa pihak Plaintif tidak dapat membuktikan bahawa the nexus between kontrak yang telah diberi kepada D1 dan D2 dengan kejadian atau kecurian kabel-kabel yang dikeluarkan tanpa kebenaran yang sah jadi for that, Mahkamah ini berpandangan bahawa D1 dan D2 tidak menanggung rugi atas losses ataupun perlu mengganti rugi pihak Plaintif terhadap kerugian yang dialami oleh pihak Plaintif.

[43] In the result, we find that there was a lack of appreciation of critical evidence by the learned judicial commissioner who concluded (*wrongly in our view*), that D1 and D2 were not vicariously liable in circumstances, where all that the plaintiff had to establish was whether there was a close connection between the wrongful act and the nature of D3's employment and that the deed was carried out in the course of D3's employment.

[44] Of course, it is axiomatic that in order for vicarious liability to be imputed to D1 and D2, D3 must have acted 'in the course of his employment'. In this regard, we gratefully adopt the principle that was distilled, refined and enunciated by the House of Lords in *Lister and others v Hesley Hall Ltd* [2002] 1 AC 215 where it was held that 'an employee will be held to have acted in the course of his employment when he committed a tort if that tort was so closely connected with his employment that it would be fair and just to hold the employer vicariously liable for that tort'.

[45] For completeness, we should add that nothing turns on the fact that D1 and D2 did not benefit in any monetary or tangible way from D3's impugned conduct. It is important to emphasise that D3 apart from being an employee of D1 and D2, was also their agent as D3 was employed to act according to instructions and to work for the benefit of D1 and D2. In this regard, it is trite that a principal is liable for the fraud of his agent acting within the scope of his authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent (see: The House of Lords decision in *Lloyd v Grace, Smith & Co* [1912] AC 716). We are mindful that at para [13.3] of D1 and D2 defence, it was stated 'that there is no principal — agency relationship between D1 and D2 and D3'. However, it is rather unarguable that agency is a contractual relationship between a principal and an agent whereby the principal, expressly or implicitly, authorizes the agent to work on his behalf and with the power to bind the principal (see: s 135 of the Contracts Act 1950). And in the context of an employment relationship, D1 and D2 are for all intents and purposes the *principals*, and D3 is their *agent* such that these parties have to act in good faith to fulfill their respective obligations under the said relationship.

[46] As such, having reviewed the evidence for ourselves, we are satisfied that based on the evidence at trial, and applying the legal test for vicarious liability as per *GMP Kaisar*, we find that the High Court had erred in dismissing the plaintiff's claim against D1 and D2 when the common denominators for finding vicarious liability were clearly present. Further, we also find D1 and D2 liable in contract per cl 43.2 of the contract, to indemnify the plaintiff for the losses suffered as a result of the unlawful removal of copper cables from the plaintiff's store. Hence, Appeal 112 is allowed and the High Court's order, vis a vis D1 and D2, is to that extent, set aside. The plaintiff's claim against D1 and

D2 is allowed. We allow the claim as per para 61 encl 22 (a), (b) and (c). The amount in (b) and (c) — is less 10% and we enter judgment for the plaintiff against D1 and D2 as follows:

(a) judgment against D1 RM2,657,769.83 (less 10%) — (b) RM2,391,992.85; and

(b) judgment against D2 RM488,051.66 (less 10%) — (c) RM439,246.49.

APPEAL 102

[47] We turn now to Appeal 102. In this regard, we will start by referring to a statement given by D6 to the plaintiff's fraud investigators on 28 January 2018. The relevant parts of D6's statement read as follows:

Soalan 2: Sila terangkan mengenal penglibatan anda dalam kes ini.

Jawapan 2: Saya hanya menghantar dokumen dalam sampul kuning coklat yang diberikan oleh Salleh kepada Kaharudin. Namun saya tidak mengetahui dokumen apa yang ada dalam sampul surat tersebut.

Kali pertama saya diminta menghantar dokumen ialah pada April 2016. Yang kedua pada Jun 2016. Seterusnya pada Ogos 2016, Oktober 2016, Disember 2016 dan Februari 2017.

Soalan 3 : Bagaimana anda pass dokumen tersebut?

Jawapan 3: Untuk April 2016, semasa di tempat parking motosikal di Ibusawat TM Maluri, Salleh ternampak saya lalu memanggil saya. Lalu, beliau meminta saya menghantar sampul surat kepada seseorang. Kemudian saya tanya siapa penerima surat tersebut, lalu beliau menjawab nanti akan ada orang yang akan call. Beliau memberikan RM20 sebagai duit rokok. Lebih kurang antara 5–10 minit selepas itu, saya menerima panggilan dari seseorang dan memperkenalkan dirinya sebagai Din. Din bertanya ada dapat barang dari Salleh. Saya menjawab ada dan bertanya di mana nak jumpa. Pada awalnya dia mahu berjumpa di Petronas Cempaka. Kemudian Din menelefon saya dan tanya tahu tak kat mana pejabat syarikat Triple A. Saya menjawab saya tahu tempat itu kerana ianya berdekatan dengan rumah saya. Lalu saya bergerak ke lokasi tersebut dan berjumpa di lorong berdekatan dengan pejabatnya, bersebelahan kedai judi. Setibanya saya di situ, saya memaklumkan bahawa saya sudah sampai dan dia datang berjumpa saya di tempat tersebut. Selepas itu saya pulang ke rumah.

Untuk Jun 2016, Salleh menelefon saya untuk berjumpa di kedai Kadir berhampiran Ibusawat Maluri. Dia minta saya hantar sampul surat kepada Din dan memberikan duit rokok sebanyak RM20. Saya menelefon Din untuk bertanya di mana hendak berjumpa. Din memberitahu untuk berjumpa di tempat mula-mula saya serahkan sunpul surat tersebut kepada dia. Untuk Ogos 2016, situasi yang sama seperti Jun 2016.

Untuk Oktober 2016, Salleh menelefon saya dan minta berjumpa di kedai Kadir. Beliau meminta saya untuk menghantar sampul surat tersebut kepada Din. Kemudian saya bertanya; kepada Salleh apa isi kandungan sampul surat ini. Salleh

tidak menjawab dan minta saya hanya hantar sahaja benda itu. Saya hantar sampul surat tersebut kepada Din di tempat yang sama. Selepas itu, saya pulang ke pejabat dan mencari Salleh. Saya bertanya apa isi kandungan sampul surat tersebut. Dia hanya berkata tidak ada apa-apa dan jangan risau. Namun saya masih belum berpuas hati dengan penjelasan beliau. Kemudian dia pergi keluar untuk membuat kerja. Dia minta saya hantar genser.

Saya datang dan hantar guna van, sampai disitu saya duduk diam dalam van sebab tengah marah. Din ambil satu benda dan baling ke cermin van. Dalam keadaan marah, saya tanya apa masalah dia. Dia kata kenapa tak tolong, kalau taknak baik balik office. Saya kemudian terajang dan tumbuk Salleh. Pada petangnya dia panggil jumpa di kedai Kadir. Sebelum saya pulang, dia meletakkan lebih kurang RM1000 dalam raga motosikal saya. Saya ambil sahaja duit tersebut namun tidka tahu untuk apa duit tersebut.

Untuk Disember 2016, Salleh memberikan RM1000 kepada saya. Kemudian dia menambah dalam RM200. Dia memberikan dalam bentuk tunai. Dia hanya meletakkan wang tersbut dalam bakul motosikal saya.

Untuk Februari 2017, Salleh memberikan RM1000 lebih kepada saya juga dengan meletakkan dalam bakul motosikal. Seminggu kemudian dia memberikan saya dalam RM100 – RM200. Selepas itu tiada lagi duit yang diberikan kepada saya.

Soalan 4: Duit yang anda dapat guna untuk apa?

Jawapan 4: Duit tersebut saya guna untuk belanja rakan-rakan saya kerana tidak tahu punca duit tersebut

Soalan 5: Terdapat soalan tambahan

Jawapan 5: Tiada

Kenyataan di atas telah dibacakan semula kepada saksi dan soalan-soalan ini kemudiannya telah diajukan di mana jawapan-jawapan adalah seperti berikut:

Soalan: Adakah kenyataan di atas benar setakat pengetahuan anda

Jawapan: Ya

Soalan: Adakah terdapat apa-apa penambahan atau pindaan kepada kenyataan di atas?

Jawapan: Tidak.

[48] During the trial, the evidence by D6 per his witness statement was as follows:

J: Saya telah ditanya dengan soalan-soalan oleh En. Ismail, namun En. Ismail sebenarnya telah menyediakan teks rakaman tersebut dan meminta saya untuk mengesahkannya.

S: Adakah pernyataan kamu di dalam rakaman tersebut tepat?

J: Tidak, ada beberapa fakta yang tidak tepat seperti contoh kononnya saya telah menghantar dokumen yang diberikan oleh Defendan Kelima kepada, Defendan

Ketiga pada sekitar bulan April, Jun, Ogos, Oktober, Disember 2016 dan Februari, 2017, sedangkan saya hanya menghantar dokumen pada April, Jun dan Ogos 2017.

S: Kamu juga ada menyatakan kamu ada menerima sejumlah duit daripada Defendan Ketiga, boleh nyatakan kenapa Defendan Ketiga memberikan kamu duit tersebut?

J: Duit yang diterima oleh saya daripada Defendan Kelima seperti yang didakwa oleh Plaintif adalah merupakan pembayaran wang yang pernah dipinjam oleh Defendan Kelima untuk membayar hutang beliau kepada saya berjumlah lebih kurang RM5,000.00.

...

S: Selepas itu apakah yang terjadi?

J: Plaintif telah melalui surat bertarikh 22.11.2018 menarik balik penggantungan kerja saya. Saya kemudiannya telah ditempatkan sebagai Juruteknik Kanan di Unit SDZ Bangsar, Wilayah KL, Division Central 1 Region, Network Management & Operation, IT & Network Technology yang dimaklumkan melalui surat bertarikh 22.11.2018 juga.

...

S: Apakah keputusan Siasatan Dalam Plaintif tersebut?

J: Jawatankuasa Tatatertib Khas Plaintif telah mensabitkan saya dengan pertuduhan yang mana melalui surat Plaintif bertarikh 29.4.2019, saya telah dihukum dengan hukuman tahan kenaikan gaji tahunan selama 12 bulan bermula dari 1.5.2019.

...

S: Kenapakah kamu katakan Plaintif tidak berhak ke atas tuntutan Plaintif ke atas kamu?

J: Saya percaya bahawa apa-apa kerugian yang ditanggung oleh Plaintif (yang mana adalah dinafikan) adalah disebabkan perbuatan jenayah pihak ketiga yang telah didakwa di Mahkamah sedangkan saya telah dibuktikan di dalam slasatan SPRM tidak terlibat dengan jenayah tersebut. Saya juga tidak seharusnya dipertanggungjawabkan dengan apa-apa liability terhadap apa-apa tindakan dan/atau penipuan yang dibuat oleh pihak ketiga terhadap Plaintif yang didakwa telah menyebabkan kerugian terhadap Plaintif tersebut. Oleh itu, saya menyatakan bahawa Plaintif tidak mempunyai apa-apa kausa tindakan terhadap saya dan saya sebenarnya tidak berhutang jumlah wang sepertimana yang dinyatakan oleh Plaintif dalam tuntutan Plaintif dan tuntutan tersebut adalah remeh, cacat dan salah terhadap saya.

[49] It is relevant to note that the plaintiff commenced disciplinary action against D6 and in this regard, by a letter dated 10 October 2018, D6 was notified that there would be a disciplinary hearing in relation to a charge of misconduct which read as follows:

SURAT PERTUDUHAN UNTUK TUJUAN TINDAKAN TATATERTIB

Adalah dimaklumkan bahawa satu laporan telah diterima yang menyatakan bahawa anda, Encik Ahmad Faizal Bin Ahmad. Zamzami. (NoK/P: 850111–14–5087) Juruteknik Kanan, ENZ Maluri, Central Region 1NMO, IT & Network Technology telah dikatakan melakukan kesalahan yang bertentangan dengan Tatatertib Syarikat seperti berikut:

1. Bahawa anda di antara 1 April 2016 hingga 28 Febuari 2017, dikatakan telah menerima dokumen-dokumen 'Maintenance Order' seperti di dalam *Jadual 1* dibawah, daripada Mohd Saleh Bin Isthnin (K/P:760308–04–5419), dan telah menyerahkan dokumen-dokurnen tersebut kepada Kaharudin Bin Yusoff (Penyelia Triple A Communication/Syukur Communication Sdn Bhd), bagi tujuan membawa keluar kabel dari Malaysian Logistic District Centre (MLDC) Cheras, tanpa mendapat arahan kerja dari majikan anda, TM Berhad.

[50] By a letter dated 29 April 2019, the plaintiff informed D6 that the punishment for his role in this episode was that his annual increment would be frozen for 12 months effective 1 May 2019. The letter reads as follows:

TINDAKAN TATATERTIB PERINTAH HUKUMAN

Siasatan Dalaman yang telah diadakan pada 21 dan 22 November 2019 ke atas pertuduhan terhadap anda seperti yang terkandung di dalam Surat Pertuduhan (8) GHCM/IR/1343/1069/NE/ST(24).01 bertarikh 10 Oktober 2018 adalah dirujuk.

Jawatankuasa Tatatertib Khas yang telah bermesyuarat pada 19 April 2019 telah mengkaji segala rekod, dokumen-dokumen yang berkaitan serta keputusan Panel Siasatan Dalaman dan mendapati anda adalah terbukti bersalah bagi pertuduhan yang dikenakan ke atas anda.

Memandangkan bahawa pertuduhan yang telah terbukti terhadap anda di dalam Siasatan Dalaman yang telah diadakan, maka Jawatankuasa Tatatertib Khas telah memutuskan dengan sebulat suara bahawa hukuman yang setimpal dengan kesalahan yang telah dibuktikan adalah hukuman TAHAN KENAIKAN GAJI TAHUNAN (KGT) SELAMA 12 BULAN yang berkuatkuasa mulai dari tarikh 1 Mei 2019.

[51] Based on the contemporaneous evidence, it is quite clear that D6 had actively participated in this nefarious scheme, albeit to a lesser extent or with less culpability as compared to D4 and D5. As such, having considered the matter, we find no reason to disturb the High Court's findings against D6, who from the statement he gave to the plaintiff's internal investigators showed quite unmistakeably that D6 was aware that something was seriously amiss. D6 was complicit at the very least, for showing wilful blindness to what were obviously shady transactions. D6's role in this nefarious scheme cannot be looked at in isolation. It is important to note that D4 recorded a consent judgment for the full sum of RM3,145,821.45 whilst the High Court went on to find liability against D3, D5 and D6. There is no appeal by D3 and D5.

[52] At the trial, D6 sought to potray that he knew nothing about what was going on. D6's testimony that the money which he received was repayment of a 'loan', was rejected by the learned judicial commissioner. In our view, rightly so. It is clear that D6's had his suspicions about what was going on. And he willingly accepted various sums of money for his role in these impugned transactions. D6's culpability is quite undeniable. And it appears that appropriate disciplinary action had been taken by the plaintiff against D6, which does not seem to have been legally challenged in the usual way (per s 20 of the Industrial Relations Act 1967). However, we agree with judicial commissioner's findings that D6's role was a limited one. Hence, the High Court imposed (quite rightly) — 20% liability on D6 (equivalent to RM566,247.86). We find no reason to disturb the High Court's findings of 20% liability against D6.

[53] We see no reason or basis or justification to exonerate D6 from his role in this criminal expedition which was orchestrated by the other more culpable players. Appeal 102 by D6 is dismissed with costs of RM20,000 (subject to allocator).

ORDERS

[54] The orders of this court are as follows;

(a) Appeal 102 — the appeal by D6 is dismissed with costs of RM20,000 (subject to allocator); and

(b) Appeal 112 — the appeal by the plaintiff is allowed. The High Court's order dated 21 December 2022 vis a vis D1 and D2 are set aside. The plaintiff's claim against D1 and D2 is allowed. We allow the claim as per para 61 encl 22(a), (b) and (c). The amount in (b) and (c) — is less 10% and we enter judgment for the plaintiff against D1 and D2 as follows:

(i) judgment against D1 RM2,657,769.83 (less 10%) — (b) RM2,391,992.85;

(ii) judgment against D2 RM488,051.66 (less 10%) — (c) RM439,246.49; and

(iii) costs of RM100,000 (subject to allocator) against D1 and D2 as costs here and below.

Appeal 112 allowed and Appeal 102 dismissed.

Reported by K Selvaraju